ESTATE OF GUADALUPE ALMANZA CONGER

IBIA 91-62 Decided March 17, 1992

Appeal from an order denying rehearing issued by Administrative Law Judge S. N. Willett in Indian probate IP PH 19I-90, IP PH 75I-91.

Affirmed in part; remanded.

1. Board of Indian Appeals: Generally--Constitutional Law: Generally

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

2. Indian Probate: Indian Land Consolidation Act: Escheat

Under sec. 207 of the Indian land Consolidation Act, 25 U.S.C. § 2206 (1988 and Supps.), the test for whether a small fractional interest in trust or restricted land escheats to the governing Indian tribe is based on the earnings produced by that interest. The Board of Indian Appeals lacks authority to substitute a different test for the one set out in the statute.

3. Indian Probate: Indian Land Consolidation Act: Escheat

Under sec. 207 of the Indian Land Consolidation Act, 25 U.S.C. § 2206 (1988 and Supps.), an interest in trust or restricted land is presumed to escheat to the governing Indian tribe if it represents 2 per centum or less of the total acreage in the land and has earned to its owner less than $100 in any one of the 5 years before the owner's death. However, the presumption favoring escheat may be rebutted by a showing that the interest is capable of earning $100 or more in any one of the 5 years following the owner's death.

4. Indian Probate: Indian Land Consolidation Act: Escheat

With respect to any Indian estate in which interests are presumed to escheat under sec. 207 of the Indian Land

Consolidation Act, 25 U.S.C. § 2206 (1988 and Supps.), evidence must appear in the probate record showing that (1) the Administrative Law Judge informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption, and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

APPEARANCES: William J. Crimmins, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Jason Scott Conger, a minor, seeks review of a January 29, 1991, order denying rehearing issued by Administrative Law Judge S. N. Willett in the estate of Guadalupe Almanza Conger (decedent). For the reasons discussed below, the Board affirms Judge Willett's order in part but remands this matter for further proceedings.

Background

On October 23, 1990, Judge Willett issued an order determining that appellant was decedent's sole heir. The Judge further determined that decedent's interests in six allotments on the Salt River Indian Reservation and five allotments on the Gila River Indian Reservation were subject to section 207 of the Indian Land Consolidation Act (ILCA), asamended, 25 U.S.C. § 2206 (1988 and Supps.), and therefore escheated to the respective tribes unless section 207 were found to be unconstitutional. 1/

1/ Section 207 presently provides, in relevant part:

"(a) No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent."

The original version of section 207 was held unconstitutional in Hodel v. Irving, 481 U.S. 704 (1987). At the time of Judge Willett's order, a suit was pending in Federal court concerning the constitutionality of section 207 as amended in 1984. Curley v. Hodel, No. Civ. 88-0886JC (D.N.M. filed July 28, 1988). This suit was later settled.

Appellant sought rehearing, arguing that (1) the estimated values of decedent's interests, as shown in the estate inventory prepared by the Bureau of Indian Affairs (BIA), did not properly reflect the actual value of the property and (2) the amended version of section 207 is unconstitutional.

Judge Willett denied appellant's petition on January 29, 1991, stating:

> The first asserted ground is not a recognizable basis for granting rehearing. The regulations, specifically: 43 C.F.R. Section 4.210(b)(3) do not mandate full appraisals to establish fair market value in probate. The regulations specifically authorize utilization of an "estimated" value. This is an express exception to 25 C.F.R. Section 152.24. */
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> As to the second ground, the Administrative Law Judge is without authority to decide constitutional questions.

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*/ In reviewing the merits of the petition, the undersigned suspects from the form of pleading, alternatively challenging the value of the property or the constitutionality of the law, that the submitting party misapprehends the criteria which invoke application of Section 207. The value of a particular interest is not a factor which is considered in determining the application of Section 207. It is the size of the interest and its income production which determine whether or not interests will be transferred to the tribe with jurisdiction over the land.

Appellant's notice of appeal from this order was received by the Board on March 29, 1991. Only appellant filed a brief.

Discussion and Conclusions

On appeal, appellant again challenges the constitutionality of section 207. Further, appellant contends:

> While there apparently is no argument that the land in question did not earn $100 a year for the requisite periods it is Appellant's position that in this particular circumstance the application of that test only would result in a gross inequity. Subsequent to the decedent's death a large portion of lands in the Salt River Indian Reservation, which were very close to some of the lands at issue here, were purchased by the State of Arizona in order to allow for the building of a freeway. This purchase, while admittedly not directly affecting the income making ability of Appellant's land, clearly would affect its actual value. In fact, on information and belief the purchases were made at values approaching $100,000 per acre. The undersigned in conversation with * * * an appraiser in the Bureau of Indian Affairs' Phoenix Office was told that he * * * felt that there was a good chance that the value of the lands in question was substantially wrong

> perhaps by a factor of ten (10). If this is, in fact, the case the application of the $100 test alone would clearly be inappropriate.

(Appellant's opening Brief at 1-2).

[1] The Board lacks jurisdiction over appellant's first contention. As it has stated on a number of occasions, this Board has no authority to declare an act of Congress unconstitutional. E.g., Redleaf v. Muskogee Area Director, 18 IBIA 268 (1990); Estate of Shonie Curley, 17 IBIA 115 (1989).

[2] In his second argument, appellant appears to argue that the earnings test set out in section 207 should either be disregarded entirely or supplemented by a test based on value. To the extent appellant may intend to challenge the statute itself, this contention, like appellant's first contention, raises issues which are outside the scope of the Board's jurisdiction.

Appellant does not suggest any theory under which the Board could disregard the mandate of section 207, which unambiguously declares that, under the described circumstances, escheat is to be presumed and may be rebutted only through the earnings test specified in the section. The section simply allows no room for the application of a substitute or supplemental test to defeat escheat.

In his notice of appeal, appellant contended that "construction of the [Arizona State] freeway itself, with its resultant increased access, has greatly enhanced the income producing value of the [Salt River] land in question" (Notice of Appeal at 2). In his brief, however, appellant abandons that argument, conceding that the State's purchase of nearby land did not directly affect the income producing capacity of decedent's interests on the Salt River Reservation.

Not only has appellant abandoned his earnings argument before the Board, he also failed to raise it at all in his petition for rehearing before Judge Willett. The Board has stated on a number of occasions that it is not required to consider arguments raised for the first time on appeal. Estate of Alice Jackson (John), 17 IBIA 162 (1989), and cases cited therein. Under most circumstances, therefore, the inquiry would end at this point, and appellant would be found to have failed to carry his burden of proof. However, the usual rules of decision may be overcome by a finding that manifest error or injustice may have occurred in the initial decisionmaking process. 43 CFR 4.318; Estate of Elmer J. Whipple, 15 IBIA 273, 274 (1987).

[3] It is not clear from the record in this case whether or not Judge Willett offered appellant an opportunity to rebut the presumption of escheat with regard to the small interests he otherwise would have inherited. 2/

2/ Judge Willett's summary of the hearing does not indicate that appellant was given that opportunity at the hearing. Nor does the record contain any written communication to appellant concerning the matter.

The estate inventory prepared by BIA showed that the interests had not earned $100 in any one of the 5 years preceding decedent's death. From this information, the presumption arose that the interests were also incapable of earning $100 in any one of the 5 years following death. However, that presumption was rebuttable. The legislative history of the 1984 amendment to section 207 clearly indicates that individuals who would, but for the escheat provision, inherit small fractional interests, should be given the opportunity to rebut the presumption that those interests escheat. See, e.g., remarks of Senator Mark Andrews, Chairman of the Senate Select Committee on Indian Affairs:

> If, upon examination of these [BIA] records, the administrative law judge concludes the property interest is incapable of earning the requisite $100 in any of the next 5 years, then the person who otherwise would have inherited the interest should be given an opportunity to present evidence to rebut the statutory presumption and preliminary finding of the administrative law judge. The burden of proof is clearly on the person contesting the proposed escheat.

130 Cong. Rec. 28930 (1984). See also remarks of Representative Morris Udall, Chairman of the House Interior Committee and sponsor of the original bill:

> It is my understanding that under this bill [as amended by the Senate], if an interest in land has not generated the required income prior to the death of the current owner, it should be presumed that the interest escheats. Individuals may, however, attempt to rebut the presumption by presenting substantial evidence of the interest's future earning capacity. For example, by presenting evidence of leasing requirements or other evidence that the property will, in fact, be capable of generating at least $100 in income in at least 1 of the 5 years after the death of the current owner. Mere speculation on future use or value will obviously be insufficient to overcame the statutory presumption favoring escheat.

130 Cong. Rec. E4108 (daily ed. Oct. 10, 1984).

It is clear that section 207 weighs heavily in favor of escheat. Individuals who wish to attempt a rebuttal of the presumption favoring escheat face a difficult task. They have no chance at all of defeating escheat, however, if they are not informed of their right of rebuttal. In order to protect the due process rights of such individuals and to implement the trust responsibility of the United States toward them, it is incumbent upon the Administrative Law Judge to inform individuals who would otherwise inherit small fractional interests that they have the right to attempt a rebuttal of the presumption of escheat. It is further incumbent upon the Judge to offer the affected individuals a reasonable opportunity to exercise that right. Evidence that this information and opportunity were provided should appear in the probate record.

[4] The Board therefore holds that, with respect to any estate in which interests are presumed to escheat under section 207 of ILCA, evidence must appear in the probate record showing that (1) the Administrative Law Judge informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption, and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

Judge Willett's order is affirmed insofar as it held that the test for whether or not an interest escheats under section 207 of ILCA is based upon the earnings of the interest during the 5 years following death, rather than the value of the interest. The matter must be remanded, however, for further proceedings regarding appellant's opportunity to rebut the presumption of escheat.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's January 29, 1991, is affirmed in part. The matter is remanded to her for further proceedings in accordance with this opinion.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge